

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE KISSNER,

Defendant-Appellant.

UNPUBLISHED

September 18, 2007

No. 271977

Shiawassee Circuit Court

LC No. 04-000993-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals from his sentence of 11 to 20 years in prison for burning real property, MCL 750.73. The trial court imposed this sentence after our Court remanded for resentencing. We affirm defendant's sentence, but remand for the preparation of a sentencing information report departure evaluation.

I. Facts

The jury convicted defendant of burning real property based on evidence that he set fire to a Michigan State Police post. The statutory sentencing guidelines, adjusted to account for defendant's status as a third habitual offender, MCL 769.11; MCL 777.21(3)(b), recommended a minimum term range of 34 to 100 months. The trial court sentenced defendant to 144 to 240 months in prison. The court held that defendant's dangerousness, the fact that he acted out of vindictiveness, as well as the amount of financial damage caused by the fire, constituted substantial and compelling reasons for exceeding the guidelines.

In *People v Kissner*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2005 (Docket No. 258333), another panel of this Court affirmed defendant's conviction but remanded for resentencing, holding that "the trial court did not err in departing from the guidelines based on the amount of damages caused by defendant but that the trial court's characterization of defendant as dangerous, as articulated on the record, was not a substantial and compelling reason for departing from the sentencing guidelines." *Id.*, slip op at 4. The Court in *Kissner I* concluded that because it could not determine whether the trial court

would have departed to the same extent based on the extent of the financial damages alone, a remand for resentencing was necessary. *Id.*¹

On remand, the trial court again found that substantial and compelling reasons existed to exceed the guidelines. The trial court observed that the cost of the damage from the fire exceeded \$335,000.00, and noted that Offense Variable (OV) 16,² authorized the scoring of ten points if the damage exceeded \$20,000.00. The trial court concluded that OV 16 did not adequately account for the extent of the damage defendant caused in this case. The trial court also found that the “sheer dangerousness of the crime” perpetrated by defendant was not adequately accounted for by scoring OV 19,³ because numerous persons, including state police troopers, were on the scene when the fire occurred. The trial court stated that even if it considered only the financial damage caused by the fire, it would depart from the guidelines to the same extent. The trial court sentenced defendant to 132 months to 240 months (11 to 20 years) in prison, with credit for 940 days.

II. Applicable Law

To constitute a substantial and compelling reason to depart from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. To be objective and verifiable, factors must be actions or occurrences that are external to the mind and must be capable of being verified. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A departure from the guidelines cannot be affirmed on the basis of a reason that the appellate court perceives but the trial court did not articulate. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant’s criminal history than would adherence to the guidelines range. Also, in departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The determination of the existence of a factor to depart from the guidelines is reviewed for clear error. The determination that a factor is objective and verifiable is reviewed de novo. The determination that objective and verifiable factors merited departure from the guidelines

¹ The *Kissner I* Court also indicated that if the trial court exceeded the guidelines on resentencing, the trial court was to complete a sentencing information report departure evaluation. *Id.*

² MCL 777.46, property obtained, damaged, lost or destroyed.

³ MCL 777.49, security threat to penal institution or court or interference with administration of justice, at 15 points.

range is reviewed for an abuse of discretion. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269.

Defendant argues that the trial court abused its discretion by exceeding the guidelines on remand. We disagree.

In *Kissner I*, this Court held that the trial court did not abuse its discretion by departing from the guidelines based on the finding that “the guidelines did not give adequate and proportionate weight to the amount of damages” caused by defendant’s offense. *Kissner I, supra* at 3. Furthermore, on remand, the trial court specifically stated on the record that OV 19, which addressed the dangerousness of the crime, was given inadequate weight. By so stating, the trial court followed the instruction of the *Kissner I* Court. *Id.* The danger to the persons in and around the building caused by the fire was objective and verifiable, irresistibly attracted the attention of the trial court, and was of considerable worth in deciding the appropriate length of defendant’s sentence. *Babcock, supra* at 257-261; *Abramski, supra*.

However, were we to assume that the trial court clearly erred in finding that the dangerousness of the crime constituted a factor that merited departure from the guidelines, defendant’s sentence should nonetheless be affirmed. The trial court clearly stated that the extensive financial damage caused by defendant’s offense, in and of itself, justified the upward departure. The trial court did not abuse its discretion by exceeding the guidelines range by 32 months. *Babcock, supra* at 262-264; *Abramski, supra*.

We affirm defendant’s sentence, and remand for the completion of a sentencing information report departure evaluation. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001). We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder